



E. I. DU PONT DE NEMOURS & COMPANY
INCORPORATED
WILMINGTON, DELAWARE 19898



DEC 22 1988

LEGAL DEPARTMENT

December 20, 1988

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Edward J. Kowalski
Assistant Regional Counsel
Attn: Ninth Avenue Dump Site
(5CS-TUB-3)
Office of Regional Counsel
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, IL 60604

Dear Mr. Kowalski:

Re: Ninth Avenue Dump - Gary, Indiana

E. I. du Pont de Nemours and Company (Du Pont) submits the following comments in response to the Administrative Order issued by the U.S. Environmental Protection Agency.¹ By submitting these comments, Du Pont does not waive any rights or defenses. Du Pont reserves the right to supplement these comments.

1. EPA Has No Basis for Issuing this Order Against Du Pont

On March 30, 1988, Du Pont received a Notice of Potential Liability at the Ninth Avenue Dump in Gary, Indiana. In response to that Notice, Du Pont denied liability and informed the Agency that a good faith search of extant records showed no involvement with this site. On April 4, 1988, Du Pont submitted a request for any information in the possession of the EPA, including all records indicating that Du Pont disposed of hazardous substances at the Ninth Avenue Dump. EPA has not, to date, provided to Du Pont any records which demonstrate that Du Pont's alleged disposal of materials at the Ninth Avenue Dump constituted disposal of a CERCLA-defined "hazardous substance" and that any "hazardous substance" allegedly

¹ This Order is issued pursuant to §106 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and requires Respondents to undertake certain remedial action activities at the Ninth Avenue Dump located in Gary, Indiana.

generated by Du Pont is actually being released or threatens to be released into the environment under CERCLA §101(22).^{1 2} EPA therefore has no basis to conclude that Du Pont is a "liable person" within the meaning of CERCLA §107 and under the Administrative Order Part IV(U) ("Findings of Fact and Determinations") with respect to the Ninth Avenue Dump and EPA should withdraw the subject Order as against Du Pont.

2. EPA Should Stay the Order Effective Date Until Issuance of the ROD for Final Site Remediation

Du Pont believes that EPA should stay the effective date of this Order until the issuance of the ROD for the final site remedy. This ROD is expected to issue in the Spring 1989 (Order at p. 17).³⁴ Because of the potential large financial commitment for remediation of the site and due to the complexity of the unresolved issues attendant to the final site remediation⁵, EPA should assure that the remediation effort is integrated rather than a piece-meal approach. EPA should also ensure that costs expended in the design of the Remedial Work Plan and in the performance of the *interim* remedy will not be made unnecessary, or worse, contribute to additional costs and delay in the design and implementation of the final remediation

¹ In response to Du Pont's 4/4/88 FOIA request for "all records that show Du Pont disposed of hazardous waste" at the site, EPA provided Du Pont the following:

1. undated and addressee unidentified form letter entitled "Sites Connected with Steve Martell Northeast, Illinois and Northwest Indiana
2. 12/1/88 letter (w/out attachments) from J. L. Whited (Du Pont) to J. DeVuono (EPA)
3. 11/26/88 letter (w/attachments) from J. L. Whited (Du Pont) to J. DeVuono (EPA)
4. miscellaneous documents styled "Customer Lists/Ledger Book" by EPA; these records do not list or indicate Du Pont.
5. *unsworn* statement of S. Martell dated 5/24/88.

In its statement, EPA responded that it has "no further documents to provide".

² In his 5/24/88 statement and in response to questions Mr. Martell alleges that Du Pont disposed of certain generally described materials at the Ninth Avenue site. This generalized statement is inadmissible and insufficient to support a finding that the allegation is true, that the alleged Du Pont material is/was a "hazardous" substance and that the alleged Du Pont material is being or threatens to be released into the environment.

³ The Order requires Respondents to submit a Remedial Work Plan and to implement the 9/20/88 Record of Decision ("ROD") for site interim remediation. Under the Order, design of the Remedial Work Plan must be completed within 6 months of the Order effective date and construction begun within 7 months of the Order effective date. (Order p. 18).

⁴ Du Pont has been advised by the Ninth Avenue Dump PRP Steering Committee that the estimated cost of implementation of the interim ROD will be approximately \$5 million.

⁵ For example, EPA has not addressed in the ROD or with the PRPs the appropriateness of the ROD interim remediation requirements and its legal and practical effect on the wetlands surrounding the site. This is a significant issue which should be addressed prior to site remediation; particularly where untimely resolution could result in the delay of the remedy under the tight timeframe of the Order.

requirements. Du Pont believes that a 4-month stay of the Order will not result in further harm to the environment nor will such a delay prejudice the Agency in expeditious remediation of the site¹. Moreover, Du Pont believes that this stay is reasonable and will afford the PRPs sufficient time to work with the Agency to develop an integrated and cost-effective remedy.

3. The Order Was Not Properly Served on Du Pont

The Order has not been properly served upon Du Pont. The Order was sent to Mark Christman, an employee of the Du Pont Company. Mr. Christman is not a corporate officer or a registered agent for purposes of receiving process of the Order. Du Pont's response to this Order does not waive its argument that, to be effective as against Du Pont, proper service of process is necessary.

Notwithstanding the above comments and objections and without waiver of liability or defenses, Du Pont, as one of the Respondents to the above Administrative Order, hereby provides notice that it intends to cooperate with the efforts of the PRP Steering Committee participants to comply with the Administrative Order terms. Du Pont expressly reserves the right to challenge the Order and to seek reimbursement of costs incurred from other parties.

Sincerely,

Mark H. Christman /ch
Mark H. Christman

¹ Du Pont notes that EPA began performance of the RI/FS four years ago (Order p. 7). The EPA has documented no change at the site since that time which would preclude a 4 -month stay of the Order's effective date and internal timetable until the final ROD issuance.